Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

92-1966

NO:

in the Supreme Court of the United States

OCTOBER TERM, 1993

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esq.
2600 Douglas Road
Penthouse One
Coral Gables, Florida 33134
Telephone: (305) 445-5320

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES ii
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS 2
STATEMENT OF THE CASE 3
A. Course of Proceedings 3
B. Facts 5
REASONS FOR GRANTING THE WRIT 8
WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

CONCLUSION 14

APPENDIX

1. Opinion of the District Court of Appeal of Florida, Fourth District App.1

2. Order of the Supreme Court of Florida denying Petition for Review . App.5

TABLE OF AUTHORITIES

Cases: Page

Bram v. United States,
168 U.S. 532, 18 S.Ct. 183 (1897)
. . . . . 8, 9, 10, 12, 13, 14

Malloy v. Hogan,
378 U.S. 1, 84 S.Ct. 1489 (1964)
. . . . . 8, 12, 13, 14

United States v. Covington,
783 F.2d 1052 (9th Cir. 1985)
cert. denied, 107 S.Ct. 117 (1986) . 11

United States v. Martindale,
790 F.2d 1129 (4th Cir. 1986)
cert. denied, 107 S.Ct. 193 (1986) . 11

United States v. Mitro,
880 F.2d 1480 (1st Cir. 1989) 11

United States v. Molina-Chacon,
627 F.Supp. 1253 (E.D.N.Y. 1986) 11, 12

United States v. Morrow,
537 F.2d 120 (5th Cir. 1976)
reh'g denied, 541 F.2d 282 (5th Cir. 1976)
cert. denied, 97 S.Ct. 1602 (1977) . 11

Withrow v. Williams,
___U.S.___, 113 S.Ct. 1745 (1993)
. . . . . 12, 13, 14

OTHER AUTHORITIES:

United States Constitution, Amendment V

. . . . . 2, 12, 13

United States Constitution, Amendment XIV

. . . . . 2, 12

PREFACE

The following references will be used by Petitioner:

(Tr. Vol.) - Trial Transcript
(App.) - Appendix to Petition

OPINION BELOW

The Opinion of the Florida District Court of Appeal, Fourth District, No. 91-1106, in this cause is reprinted in the Appendix to this Petition at App. 1. The case is reported at 608 So.2d 930 (4th DCA 1992), cert. denied.

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered November 18, 1992. Petition for Review was denied by Order of the Supreme Court of Florida issued March 17, 1993. Title 28 U.S.C § 1254(1) is the statutory provision which confers jurisdiction on this Court to review the appellate decision in question.

CONSTITUTIONAL PROVISIONS

The issue herein concerns the Fifth and Fourteenth Amendments to the United States Constitution:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws . . .

STATEMENT OF THE CASE

A. Course of Proceedings

On January 23, 1985, a grand jury sitting in Broward County, Florida, returned a four-count Indictment charging Petitioner and four (4) other individuals with two counts of murder in the first degree and two counts of kidnapping. On March 4, 1988, Petitioner filed his Motion to Suppress Oral and Written Admissions, Statements and Alleged Confessions. (Tr. Vol. XX, 3008). In particular, Petitioner sought to suppress the post-arrest oral statements made by him to British officials in the United Kingdom. Petitioner made these statements after he had been held incommunicado for more than two days and interrogated repeatedly by the British officials. On July 5, 1990, a hearing was held on the Motion to Suppress. On July 7, 1990, the Motion to

Suppress was denied. (Tr. Vol. II, 298; Tr. Vol. XX, 3066).

On July 10, 1990, Petitioner's first trial began. On August 3, 1990, a mistrial was declared when the jury indicated its inability to arrive at a verdict. (Tr. Vol. XXI, 3162). The parties later determined the jurors had deadlocked at eleven to one in favor of acquitting Appellant of all charges. (Tr. Vol. XXI, 3166).

On January 8, 1991, Appellant's second trial began. Evidence was adduced at trial that on numerous occasions while being interrogated by the British officials, and before he gave an incriminating statement, Petitioner had repeatedly refused to answer questions and requested to have legal counsel present. (Tr. Vol. I, 79-81, 132, 135). On January 30, 1991, the jury returned its verdict of

guilty on both Counts of First Degree Murder. (Tr. Vol. XVIII, 2801).

The Florida District Court of Appeal, Fourth District found no error in the denial of Petitioner's Motion to Suppress and Petitioner's convictions were affirmed. Errico v. State, 608 So.2d 930 (4th DCA 1992), cert. denied, ___So.2d___, (Fla. 1993).

B. Facts

On September 5, 1985, Petitioner, a United States citizen, was detained at Heathrow Airport, London, England, by British law enforcement officials from Scotland Yard.[1] In the airport, the British officials searched Petitioner's luggage and found two "flick knives" (switch blades). Petitioner was formally

---

[1] At the hearing on Petitioner's Motion to Suppress, the British officials admitted that Petitioner's arrest was pretextual.

placed under arrest and placed in a cell at Heathrow Airport.

Petitioner was held incommunicado for approximately fifty-five (55) hours during which time he was subjected to repeated interrogation by the British officials. During this period of time, Petitioner requested counsel on approximately thirty-seven (37) separate occasions and made several explicit requests that the interrogations cease.

On the second day of Petitioner's custody, the British officials contacted the Federal Bureau of Investigation and discovered Petitioner's true identity, (based on a passport found in his luggage) and that he was a fugitive from the United States on murder and kidnapping charges.

As the interrogation resumed, Petitioner replied "I request legal counsel" in response to each of the

questions posed by the British officials. Petitioner was advised that he could be detained and held incommunicado for ninety-six (96) hours at which time the British officials could apply to the court to permit additional incommunicado inquiry periods of up to seventy-two (72) hours.

The British officials then questioned Petitioner about the matters for which Petitioner was wanted in the United States. In response, Petitioner finally succumbed to his inquisitors and made certain highly inculpatory statements concerning the crimes for which he was indicted. These statements were admitted in evidence at Petitioner's trial and formed the basis for his conviction.

REASONS FOR GRANTING THE WRIT

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

The Florida District Court of Appeal, Fourth District, has decided a question of law in direct conflict with the decisions of this Court in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964).

In Bram, two murders were committed aboard a United States ship en route to South Africa. Id. at 194. Bram, one of the individuals suspected of being responsible for the murders, was taken ashore at Halifax, Nova Scotia, where he was thoroughly interrogated regarding the

murders. Id. at 194. The police officers conducting the interrogation were from Halifax. Id. at 194. The Court held that the confession was involuntary, and accordingly, it should not have been allowed in evidence at Bram's trial in the United States. Id. at 195.

Petitioner, like Bram, made involuntary statements to foreign officials and at trial in the United States, these statements were relied upon by the prosecution to secure Petitioner's conviction. The Supreme Court observed the following in reversing Bram's conviction as a result of the erroneous admission of the coerced confession:

> In the case before us we find that an influence was executed, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that an error was committed by the trial court in admitting the confession under

> the circumstances disclosed in the record.

Bram, 18 S.Ct. at 195. [emphasis added].

There was no question that Petitioner's statements were obtained through highly coercive circumstances and would have clearly been inadmissible if obtained by any State or Federal law enforcement officer in the United States. The circumstances of Bram are virtually indistinguishable from those instanter. In both cases, foreign officials used improper and coercive interrogation techniques to compel a confession from the accused. Consequently, it is clear that the same result in Bram is mandated here.

The District Court of Appeal of Florida, Fourth District, ignored this Court's precedents and instead improperly relied on a series of clearly distinguishable and/or inapplicable

decisions in holding that the denial of Petitioner's Motion to Suppress was proper: United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989) (case turned on the Fourth Amendment not the Fifth and Sixth Amendments); United States v. Rosenthal, 793 F.2d 1214, opinion modified, 801 F.2d 378 (11th Cir. 1986) (case concerned Fourth Amendment rights, not Fifth and Sixth Amendment rights); United States v. Martindale, 790 F.2d 1132 (4th Cir. 1986) (defendant "readily agreed" to interrogation conducted in "cordial" manner free from coercion or duress); United States v. Covington, 783 F.2d 1052 (9th Cir. 1985) (remanded to determine if confession comported with due process); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) (case turned on Fourth Amendment law and not the Fifth Amendment); United States v. Molina-

Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986) (statements clearly voluntary and clearly satisfied due process).

The District Court of Appeal of Florida, Fourth District, ignored applicable precedent from this Court which held that a defendant's Fifth Amendment rights are violated where statements, coerced in a foreign jurisdiction, are relied upon to secure a defendant's conviction. See Bram, 168 U.S. 532, 18 S.Ct. 183 (1897).

In Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964), the Supreme Court recognized that the holding in Bram applied to the states through the Fourteenth Amendment. (See Withrow v. Williams, ___ U.S.___, 113 S.Ct. 1745, 1751 (1993)). "The American system of criminal prosecution is accusatorial, not inquisitorial" and "the Fourteenth

Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty. . . for such silence." Malloy, 84 S.Ct. at 1493-94.

This very term, this Court recognized the continued viability of this cornerstone principle of law in Withrow v. Williams, ___ U.S.___, 113 S.Ct. 1745 (1993), a police officer threatened to "lock up" the defendant during a station house interrogation causing the defendant to make inculpatory statements regarding a double murder. Although, in Withrow, the Court expressed no opinion on the merits of the defendant's involuntariness claim, the Court reaffirmed the principles in Bram and Malloy that involuntary and

coerced confessions made in response to custodial interrogations are not admissible at the time of trial. Withrow, 113 S.Ct. at 1749, 1751, 1753, 1756.

The opinion of the Florida District Court of Appeal, Fourth District is clearly in conflict with Bram, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy, 378 U.S. 1, 84 S.Ct. 1489. Accordingly, this case should be reviewed by this Honorable Court in order to address this important issue of criminal jurisprudence, resolve this conflict, and restore Petitioner's constitutional rights.

CONCLUSION

Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution and seeks relief in this Court to restore those rights. This issue is capable of repetition, particularly as international

law enforcement and cooperation between the United States and Foreign governments becomes more frequent in a world which shrinks every day. Based on the arguments and authorities cited herein, Petitioner, Scott Nicholas Errico, respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, reverse the Petitioner's conviction, and for such other relief as is just and proper.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esq.
The Douglas Centre
2600 Douglas Road, PH 1
Coral Gables, Florida 33134

Telephone: (305) 445-5320

Attorneys for the Petitioner

Scott Nicholas ERRICO, Appellant,

v.

STATE of Florida, Appellee.

No. 91-1106.

District Court of Appeal of Florida,
Fourth District.

Nov. 18, 1992.

Defendant was convicted in the Circuit Court for Broward County, Stanton S. Kaplan, J. Defendant appealed. The District Court of Appeal held that admission of evidence made to codefendant was not a violation of defendant's Sixth Amendment rights.

Affirmed.

Joel Hirschhorn and Robert M. Einhorn of Joel Hirschhorn, P.A., Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Carol Cobourn Asbury,

Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Affirmed. In London the appellant, a United States citizen, was taken into custody and questioned by airport authorities and Scotland Yard detectives. He contends that several of his Fifth and Sixth Amendment rights were violated in the course of his interrogation. Upon a review of the record, we find no error in the denial of appellant's motion to suppress. United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989); United States v. Rosenthal, 793 F.2d 1214, opinion modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); United States v. Martindale, 790 F.2d 1129 (4th Cir.), cert. denied, 479 U.S. 855, 107 S.Ct. 193, 93 L.Ed.2d 125 (1986); United States v.

Covington, 783 F.2d 1052 (9th Cir.), cert. denied, 479 U.S. 831, 107 S.Ct. 117, 93 L.Ed.2d 64 (1986); United States v. Morrow, 537 F.2d 120, reh'g denied, 541 F.2d 282 (5th Cir. 1976), cert denied, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977); United States v. Molina-Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986).

We also find no error in the admission of evidence concerning appellant's statements made to a codefendant during the time they were held in nearby cells while awaiting trial. There is no evidence of any advance arrangement between the authorities and the codefendant or of any state action designed to elicit incriminating statements from appellant. See Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Even though he questioned the "coincidence" of his being placed in the same maximum security "pod,"

as his codefendant, the appellant has not demonstrated a violation of his Sixth Amendment rights as set forth in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Additionally, we find no violation of appellant's Sixth Amendment rights during voir dire. Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), cert. denied, ___ U.S.___, 111 S.Ct. 2045, 114 L.Ed.2d 129 (1991).

GUNTHER and STONE, JJ., and MOE, LEROY H., Associate Judge, concur.

SUPREME COURT OF FLORIDA

WEDNESDAY, MARCH 17, 1993

CASE NO. 80,976

District Court of Appeal,
Fourth District

91-1106

SCOTT NICHOLAS ERRICO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court